

**Pembangunan Darjat Sdn Bhd v
Wong Jie Tshung & Ors**

HIGH COURT (SANDAKAN) — SUIT NO S22-12 OF 1997

RICHARD MALANJUM J

20 JANUARY 2000

Land Law — *Adverse possession — Claim to title by adverse possession — Occupation with consent of previous owner — No ‘unlawful’ or ‘wrongful’ entry or occupation — Whether merely tenancy coupled with equity proved — Whether claim for possession statute barred — Sabah Limitation Ordinance arts 108, 110, 111 & 112 — Sabah Land Ordinance s 6(2)*

The plaintiff became the registered owner of a piece of land (‘the land’) having purchased the land from the previous registered owners. The plaintiff brought an action against the defendants for possession of the land. It was not disputed that the defendants or their predecessors were duly permitted by the previous owner of the land to occupy portions thereof as early as before the Second World War provided that they developed these portions. Consequently, the defendants or their predecessors built their houses on those portions of the land occupied by them and planted fruit trees within the vicinity of their houses. There was also no challenge to the assertion that prior to 1981, the defendants or their predecessors paid nominal rentals to the previous owner. In 1982, a notice to quit was issued to the defendants. The defendants ignored the 1982 notice and so were the subsequent notices. The defendants contended that the plaintiff’s claim was statute-barred under the Sabah Limitation Ordinance (‘the Ordinance’). It was argued that pursuant to art 112 of the Schedule to the Ordinance, the plaintiff could no longer claim to have any interest over the portion of the land occupied by the defendants as the same had vested upon the defendants through the doctrine of adverse possession. The defendants also relied on arts 108, 110 and 111 of the Schedule. Further, the defendants submitted that in view of the promise made by the previous owners to the defendants or their predecessors that they could come to stay on the land as long as they wished provided that they developed it and paid rentals until 1982, the defendants should have therefore acquired tenancy coupled with equity. The plaintiff submitted that: (i) the third defendant was a licensee and thus his occupation had never been adverse; (ii) the 42nd defendant had been in occupation of the house for less than 12 years and thus his defences of adverse possession and limitation failed; and (iii) the remaining defendants (‘the 16 defendants’) had permission from the previous owner to enter the land and remain there for as long as they wish. Thus, despite the 1982 notice, there should be no question of unlawful entry and therefore there could be no adverse possession. The plaintiff also contended that the defendants had failed to establish tenancy coupled with equity. The plaintiff also raised the issue of the applicability of s 6(2) of the Sabah Land Ordinance.

A Held:

- B** (1) The third defendant while under examination-in-chief indicated that there was truth that in 1982 the previous owner of the land allowed him to remain therein until they (the previous owner) decide to sell it. There was no qualification made to such a statement as given. With that kind of concession, it was reasonable to conclude that the occupation of that portion of land by the third defendant must have been only as a licensee. As such, he could not rely on the doctrine of adverse possession to defeat the claim of the plaintiff. Hence, the plea under art 112 in so far as the third defendant was concerned must therefore be considered as having failed (see p 223G–I).
- C**
- D** (2) It was the burden of the 42nd defendant to prove that there had been an occupation of the house and thus that portion of the land for not less than 12 years in order to benefit from the doctrine of adverse possession. On the evidence adduced, there was nothing to suggest that such burden had been satisfied. Hence, the 42nd defendant failed in his reliance on art 112 (see p 224B–D).
- E** (3) The requirement of ‘unlawful’ or ‘wrongful’ entry or occupation of an immovable property is the very essence of the doctrine of adverse possession. Since the initial entry of the 16 defendants or their predecessors was not wrongful or unlawful, therefore the basic ingredient of adverse possession had not been satisfied and thus it did not apply in this case. As such, the reliance on the doctrine vis-à-vis art 112 by the 16 defendants was obviously misconceived (see pp 225G, 226D–E).
- F** (4) The 1982 notice was bad in law. The court did not have the benefit of the actual content of the notice and thus it could not be ascertained if there was any period given to vacate the land proportionate to the period of stay granted to the occupants, including the 16 defendants or their predecessors by the previous owners. Further, in view of the term as contended and not disputed, namely an earlier permission to enter and stay on the land given to the occupants, including the 16 defendants or their predecessors, the 1982 notice to quit could not have validly terminated it (see p 225A–B, F).
- G**
- H** (5) The landlord-tenant relationship is a matter of privity between the previous owner and the defendants. Hence, art 108 has no application as the plaintiff was not suing in his capacity as the landlord of the defendants (see p 228C–D).
- (6) The claim on the land by the plaintiff was based on its title to the land and not on possessory title. Hence, art 110 has no application (see p 229E).
- I** (7) On the evidence, there was nothing to show that there existed a tenancy with express terms. Although rental payments were made, there was nothing else to show that there were other terms upon breach that would result in forfeiture or other penalties.

Therefore, to say that the non-payment from 1982 provided to the previous owners a cause of action for breach of a term tenancy was unfounded. Further, there was no evidence adduced as to the exact nature of the 1982 notice. At any rate, any tenancy would have been between the previous owners and the defendants. Moreover, the cause of action in this suit was based on title and not on possessory title. Hence, art 11 of the Schedule to the Ordinance has no application in this action (see pp 229H–230A).

- (8) It is obvious that upon the legislation of the Land Ordinance, the legislature in its wisdom did not initially include alienated areas of state land. The definition of state land as given in the Land Ordinance is very clear and there is no reason to widen its meaning. The language of s 6(2) does not permit it to be construed as declaratory in nature. Indeed, the fact that the amending provision only took effect from 24 December 1997 should pre-empt any suggestion that the legislature intended it to have a retrospective effect. Hence, the alternative submission of the plaintiff failed (see pp 232B–C, H, 233B).
- (9) The defendants had established their tenancy coupled with equity on the balance of probabilities as regards their occupancy of the land. They would be amenable to compensation payment in satisfaction of their equity (see pp 235I–236A).
- (10) The 41st defendant who did not come to court may have left the matter to his counsel. But it was a fact that no evidence was led on his behalf. Thus even if his defence is as per the pleading, the truth of his assertion therein would still be required to be tested under oath before any consideration or weight could be placed upon it. Hence, the 41st defendant should not be put under the same category as the other defendants. Therefore, in his case, judgment for the plaintiff as prayed for should be entered (see p 236F–H).

[Bahasa Malaysia summary]

Plaintif menjadi tuanpunya berdaftar sebidang tanah ('tanah tersebut') setelah membeli tanah tersebut daripada bekas tuan punya berdaftar. Plaintiff telah memulakan tindakan terhadap defendan untuk milikan tanah tersebut. Tiada pertikaian bahawa defendan-defendan atau penduduk sebelumnya telah diberikan kebenaran oleh bekas tuan punya tanah tersebut untuk mengambil bahagian tersebut seawal sebelum Perang Dunia Kedua dengan syarat mereka membangunkan bahagian tersebut. Oleh demikian, defendan-defendan atau penduduk sebelumnya telah membina rumah mereka di atas bahagian tanah tersebut yang mereka duduki dan menanam pokok buah-buahan di dalam kawasan rumah mereka. Tidak ada juga apa-apa tentangan untuk menyatakan dengan tegas bahawa sebelum tahun 1981, defendan-defendan atau penduduk sebelumnya telah

A membayar sewa nominal kepada bekas tuan punya tersebut. Pada tahun 1982, satu notis keluar telah diserahkan kepada defendan-defendan. Defendan-defendan tidak menghiraukan notis tahun 1982 tersebut dan juga notis-notis selanjutnya. Defendan-defendan menghujahkan bahawa tuntutan plaintif telah melampaui batasan had masa di bawah Ordinan Had Masa Sabah ('*Ordinan tersebut*').

B Adalah dihujahkan bahawa menurut perkara 112 di dalam Jadual kepada Ordinan tersebut, plaintif tidak boleh lagi menuntut apa-apa kepentingan ke atas bahagian tanah tersebut yang telah didiami oleh defendan-defendan tersebut kerana defendan-defendan mempunyai kepentingan melalui doktrin kepentingan bertentangan. Defendan-defendan juga bergantung kepada perkara-perkara 108, 110 dan 111 Jadual tersebut. Tambahan pula, defendan-defendan telah menghujahkan bahawa dengan mengambil kira janji yang telah dibuat oleh bekas tuan punya tersebut kepada defendan-defendan atau penduduk sebelumnya bahawa mereka boleh menduduki di atas tanah tersebut untuk selama mana yang mereka hendaki dengan syarat mereka membangunkannya dan membayar sewa sehingga 1982, defendan-defendan oleh itu sepatutnya memperoleh sewaan disertai ekuiti. Plaintif telah menghujahkan bahawa: (i) defendan ketiga merupakan pemegang lesen dan oleh itu penempatan beliau tidak pernah bertentangan; (ii) defendan ke-42 telah menetap di rumahnya tidak kurang daripada 12 tahun dan oleh itu pembelaan beliau terhadap milikan bertentangan dan had masa gagal; dan (iii) defendan-defendan lain ('16 orang defendan tersebut') telah mendapat kebenaran daripada bekas tuan punya tersebut untuk memasuki tanah tersebut dan menetap di situ selama mana mereka hendaki. Oleh itu, walaupun dengan notis tahun 1982 tersebut, tidak sepatutnya wujud apa-apa persoalan tentang kemasukan yang tidak sah di sisi undang-undang dan oleh demikian tidak ada milikan bertentangan. Plaintif juga menghujahkan bahawa defendan-defendan telah gagal untuk mewujudkan sewaan disertai ekuiti. Plaintif juga telah menimbulkan persoalan tentang pemakaian s 6(2) Ordinan Tanah Sabah.

E

F

G **Diputuskan:**

(1) Defendan ketiga semasa di dalam pemeriksaan utama telah menunjukkan terdapat kebenaran bahawa pada tahun 1982 bekas tuan punya tanah tersebut telah membenarkan beliau menetap di situ sehingga mereka (bekas tuan punya tersebut) bercadang untuk menjual tanah tersebut. Tidak apa-apa syarat dibuat kepada kenyataan yang telah diberikan. Dengan kompromi sedemikian, adalah munasabah untuk membuat kesimpulan bahawa penempatan di bahagian tanah tersebut oleh defendan ketiga mungkin sekali hanya sebagai seorang pemegang lesen. Oleh demikian, beliau tidak boleh bergantung kepada doktrin milikan bertentangan untuk menggagalkan tuntutan plaintif. Justeru itu, rayuan di bawah perkara 112 sejauh mana yang defendan ketiga berkaitan seharusnya dipertimbangkan sebagai telah gagal (lihat ms 223G-I).

H

I

- (2) Adalah beban defendan ke-42 untuk membuktikan bahawa terdapat penempatan di rumah tersebut dan oleh itu bahagian tanah tersebut selama tidak kurang daripada 12 tahun bagi tujuan memanfaatkan doktrin milikan bertentangan tersebut. Di atas keterangan yang dikemukakan, tidak ada apa-apa untuk mencadangkan bahawa beban tersebut telah dipenuhi. Justeru itu, defendan ke-42 telah gagal untuk bergantung kepada perkara 112 (lihat ms 224B-D). **A**
- (3) Keperluan kemasukan atau penempatan yang 'tidak sah di sisi undang-undang' atau 'salah' terhadap satu harta tak alih merupakan pati kepada doktrin milikan bertentangan tersebut. Memandangkan kemasukan terdahulu oleh 16 orang defendan-defendan atau penduduk sebelumnya adalah tidak salah atau sah di sisi undang-undang, oleh demikian unsur asas milikan bertentangan tidak dipenuhi dan justeru itu tidak terpakai di dalam kes ini. Oleh demikian, kebergantungan terhadap doktrin bertentangan dengan perkara 112 oleh 16 orang defendan-defendan tersebut adalah dengan nyata telah disalah tanggap (lihat ms 225G, 226D-E). **B**
- (4) Notis tahun 1982 tersebut adalah tidak betul di sisi undang-undang. Mahkamah tidak mendapat manfaat tentang kandungan sebenar notis tersebut dan oleh itu tidak dapat memastikan sama ada apa-apa tempoh masa untuk keluar daripada tanah tersebut telah diberikan bersekadar dengan tempoh penggantungan yang diberikan kepada penduduk-penduduk tersebut, termasuklah 16 orang defendan-defendan atau penduduk sebelumnya oleh bekas tuan punya tersebut. Tambahan pula, dengan mengambil kira terma seperti mana yang ditegaskan dan tidak dipertikaikan, terutamanya, kebenaran terdahulu untuk memasuki dan menduduki tanah tersebut yang telah diberikan kepada penduduk-penduduk tersebut, termasuklah 16 orang defendan-defendan tersebut atau penduduk sebelumnya, notis tahun 1982 untuk keluar tidak mungkin telah ditamatkan secara sah (lihat ms 225A-B, F). **C**
- (5) Hubungan tuan punya tanah-penyewa merupakan satu perkara priviti antara bekas tuan punya dan defendan-defendan. Justeru itu, perkara 108 tidak terpakai kerana plaintif tidak menyaman di dalam kedudukan beliau sebagai seorang tuan punya tanah kepada defendan-defendan tersebut (lihat ms 228C-D). **D**
- (6) Tuntutan ke atas tanah tersebut oleh plaintif adalah berdasarkan hak miliknya ke atas tanah tersebut dan bukan atas hak milik pemilikan. Justeru itu, perkara 110 tidak terpakai (lihat ms 229E). **E**
- (7) Berdasarkan keterangan, tiada apa yang menunjukkan bahawa wujud satu sewaan dengan terma yang nyata. Walaupun bayaran sewa telah dibuat, tidak ada apa-apa yang lain untuk menunjukkan bahawa terdapat terma-terma lain akibat pelanggaran yang akan mengakibatkan perlucutan hak atau penalti-penalti lain. Oleh demikian, untuk mengatakan bahawa **F**
- G**
- H**
- I**

- A pembayaran yang tidak dibuat daripada tahun 1982 tersebut memberikan bekas tuan punya tersebut satu kausa tindakan kerana pelanggaran satu terma sewaan adalah tidak wujud. Tambahan pula, tiada keterangan yang dikemukakan tentang sifat sebenar notis tahun 1982 tersebut. Dalam apa keadaanpun, apa-apa sewaan adalah antara bekas tuan punya tersebut dan defendan-defendan. Tambahan pula, kausa tindakan di dalam guaman ini berdasarkan hak milik dan bukan hak milik pemilikan (possessory title). Justeru itu, perkara 11 di dalam Jadual kepada Ordinan tersebut tidak terpakai di dalam tindakan ini (lihat ms 229H–230A).
- B
- C (8) Adalah jelas bahawa dengan adanya perundangan Ordinan Tanah tersebut, badan perundangan di dalam kearifannya tidak pada mulanya memasukkan kawasan-kawasan beri-milik tanah kerajaan. Definisi tanah kerajaan seperti mana yang diberikan di dalam Ordinan Tanah tersebut adalah amat jelas dan tidak ada sebab untuk memperluaskan maksudnya. Bahasa s 6(2) tidak membenarkannya ditafsirkan sebagai mempunyai sifat perisytiharan. Adalah benar pada hakikatnya bahawa peruntukan pindaan yang hanya mula berkuat kuasa mulai daripada 24 Disember 1997 hendaklah menghalang apa-apa cadangan bahawa perundangan tersebut bertujuan agar ia mempunyai kesan yang kebelakangan. Justeru itu, penghujahan alternatif plaintif gagal (lihat ms 232B–C, H, 233B).
- D
- E (9) Defendan-defendan telah mewujudkan sewaan mereka disertai ekuiti atas imbalan kebarangkalian berhubung dengan penempatan mereka atas tanah tersebut. Mereka tentu sekali mahu bayaran pampasan untuk memenuhi ekuiti mereka (lihat ms 235I–236A).
- F
- G (10) Defendan ke-41 yang tidak hadir ke mahkamah mungkin telah menyerahkan perkara tersebut kepada peguamnya. Tetapi ia merupakan satu hakikat bahawa tiada keterangan telah diberikan bagi pihak beliau. Oleh itu, walaupun jika pembelaan beliau adalah seperti rayuan, kebenaran penegasan beliau akan masih dihindaki untuk diuji di bawah akuan sumpah sebelum apa-apa pertimbangan atau beban dapat diletakkan ke atasnya. Justeru itu, defendan ke-41 sepatutnya tidak diletakkan di bawah kategori yang sama dengan defendan-defendan yang lain. Oleh demikian, di dalam kes beliau, penghakiman untuk plaintif sebagai mana dipohon sepatutnya dimasuki (lihat ms 236F–H).]
- H

Notes

For cases on claim to title by adverse possession, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1516–1524.

I

Cases referred to

Aik Ming (M) Sdn Bhd v Chang Ching Chuen [1995] 2 MLJ 770 (refd)
Bannister v Bannister [1948] 2 All ER 133 (refd)

- Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 (refd) **A**
- Buckinghamshire County Council v Moran* [1990] 1 Ch D 623 (refd)
- Carson v Carson* [1964] 1 WLR 511 (refd)
- Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 (refd)
- Hughes v Griffin* [1969] 1 All ER 460 (refd) **B**
- Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 (refd)
- Inwards v Baker* [1965] 1 All ER 446 (refd)
- Kanhaiya Lal v Girwar* AIR 1929 All 753 (refd)
- Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 (refd) **C**
- Lovell and Collard's Contract* [1907] 1 Ch 249 (refd)
- Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors* AIR 1962 SC 1543 (refd)
- Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 (refd)
- Narinder Kaur v Deyoh Opong* [1997] 2 CLJ 895 (refd)
- NKM Holdings Sdn Bhd v Pan Malavsia Wood Bhd* [1987] 1 MLJ 39 (refd) **D**
- Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 (refd)
- PR Panikar v Chwee May Kwong* [1958] MLJ 136 (refd)
- Ramsden v Dyson* (1866) LR 1 HL 129 (refd)
- Rethnasamy v Teoh Ngoo Mooi & Anor* [1983] MLJ 344 (refd) **E**
- Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646 (refd)
- Sidram Lachmaya v Mallaya Lingaya Chilaka* AIR 1949 Bom 137 (refd)
- West v Gwynne* [1911] 2 Ch 1 (refd) **F**

Legislation referred to

- Civil Law Act 1956 s 28(2)
- Land Ordinance ss 4, 6(1), 6(2), 88
- Limitation Act 1908 (India) arts 142, 144
- Limitation Ordinance (Sabah Cap 72) ss 26, 144, arts 108, 109, 110, 111, 112 of the Schedule, **G**

David Fung Yin Kee (Alex Pang & Co) for the plaintiff.

Francis Wong (Peter Lo & Co) for the defendants.

Cur Adv Vult **H**

Richard Malanjum J:

INTRODUCTION

This is an action by the plaintiff against the defendants for the following relief: **I**

- (1) A declaration that the first to the seventy-first defendants' right to remain and use the plaintiff's land held under document of title Country Lease

- A** No 14510 at Sandakan, Sabah ('the land') or any part thereof has been determined on 31 December 1996,
- (2) Possession of the land,
 - (3) Damages for trespass,
 - (4) Further or other relief; and
- B** (5) Costs

However, in his final submission learned counsel for the plaintiff disclosed that his client would only ask for the following:

- C** (1) Possession of the land against each of the defendants within one year from 26 February 1999 (which was the date defendants closed their case);
- (2) Alternatively, if the court should find that an equity has been raised and compensation is payable to the said sixteen defendants, possession of the land against each of said sixteen defendants within one year from 26 February 1999 after the plaintiff has paid the compensation in the sum of RM4,500, and possession of the land against the said remainder five defendants within one year from 26 February 1999 without any compensation, and
- D** (3) Costs.

E Further, at the commencement of the hearing only 21 of the cited defendants actually proceeded with the case, namely, 1st, 2nd, 3rd, 5th, 6th, 8th, 9th, 10th, 18th, 19th, 20th, 30th, 34th, 35th, 36th, 40th, 42nd, 44th, 53rd, 54th and 57th (hereinafter collectively referred to as 'the remaining defendants'). And the 41st defendant did not appear during the trial. Meanwhile, the 70th defendant was not served whilst the rest compromised and settled with the plaintiff.

F It is also the stand of the plaintiff that in the event of the plaintiff successfully obtaining possession it will not pursue its claim for damages against the defendants. Hence, it is not necessary to consider the Agreed Issue 3 in this judgment.

G On the other hand the remaining defendants including the 41st defendant are making a counter-claim seeking for the following relief:

- (a) a declaration that the plaintiff's rights and title to the respective portion of the land under CL 1451 occupied by the respective defendants is extinguished by virtue of s 26 of the Limitation Ordinance (Sabah Cap 72);
- H** (b) a declaration that the plaintiff's rights and title to the respective portion of the land under CL 14510 occupied by the respective defendants have vested in the respective defendants by virtue of s 26 of the Limitation Ordinance (Sabah Cap 72) and the defendants are entitled to remain in possession and enjoyment of the same;
- I** (c) a declaration that the respective defendants had acquired a possessory title to the respective portion of the land on which the respective defendants' dwelling house stands.
- (d) costs; and
- (e) such other relief that this honourable court deems fit.

AGREED FACTS

A

At the outset of the hearing the parties submitted a statement of facts which was duly marked as 'AF-1'. The contents read:

- (1) The trial is now between the plaintiff and the remaining twenty-eight (28) defendants, namely: the 1st to 3rd, 5th, 6th, 8th to 12th, 16th, 18th to 20th, 30th, 34th to 36th, 40th to 42nd, 44th, 46th, 53rd, 54th & 57th defendants (collectively as 'the defendants'). B
- (2) The defendants (except for 41st defendant) are presently residing on various parts of a piece of land held under document of title Country Lease No 14510 measuring about 98 acres situated at around Mile 1.5 North Road in the District of Sandakan, Sabah ('the land'). C
- (3) The plaintiff is and became the registered owner of the land from 8 December 1995 onwards, having purchased the land from the previous registered owners, Mr Kwan Kun Ming and Mr Kwan Tong Ming. C
- (4) Prior to 1981 the defendants and/or their predecessors have been paying rent to the previous owners as their tenants for the various parts of the land and thereafter no rental was paid. D
- (5) By a letter dated 14 November 1995 from the previous owners' solicitors Messrs Tan Pang Tsen & Co, each of the defendants and/or their predecessors had been given a notice to quit the land by 31 December 1996. D
- (6) The plaintiff had through its present solicitors sent letters before action dated 3 March 1997 to the defendants giving them until 7 April 1997 to quit and deliver up vacant possession of the land. E

It is also not in dispute that some of the remaining defendants or their predecessors were duly permitted by the previous owners of the land to occupy portions thereof as early as before the Second World War provided that they developed those portions. Consequently those remaining defendants or their predecessors built their houses on those portions of the land occupied by them. They also planted fruits trees within the vicinity of their houses mainly for their own consumption. F

There was also no challenge to the assertion that prior to 1981 the occupants of the land including the remaining defendants or their predecessors paid nominal rentals to the previous owners. In 1982, a notice to quit was issued to the occupants by Man Woo Loong in which the partners were the previous registered owners of the land and one Kwan Chew Ming. The latter is also the attorney of the previous registered owners in respect of the land. The occupants including the remaining defendants ignored the 1982 notice and so were the subsequent notices. G

H

THE AGREED ISSUES

The parties agreed to the issues to be considered in this trial, as per 'AI', namely:

- (1) Is the plaintiff (P) statute-barred from instituting this action for recovery of the land from the defendants (Ds) because Ds have been in adverse possession of the land for more than 12 years before this action was commenced? I

- A** If yes, P's claim will be dismissed, and the second issue below arises for determination.
If no, P will be entitled to possession and the third and fourth issue as stated below arises for determination.
- B** (2) Does s 26 of the Limitation Ordinance (Sabah Cap 72) read together with the Land Ordinance (Sabah Cap 68) have the effects of extinguishing P's registered title in the respective portions of the land on which the Ds' dwelling houses stand, as well as vesting the title in those portions of land in the respective Ds?
- (3) What damages are payable by Ds to P?
- (4) Are Ds' tenancy coupled with an equity within the meaning of s 28(2) of the Civil Law Act 1956?
- C** If no, the whole of Ds' counterclaim is dismissed.
If yes, fourth issue as stated below arises for determination.
- (5) What is Ds' equity and how are they to be compensated?

And I agree with learned counsel for the plaintiff that save for issue 3 thereof the burden to prove the other issues lies with the remaining defendants.

Issues (1) and (2)

As these two issues are interrelated, I think they can be dealt with simultaneously. Basically these issues revolve around the questions of whether the claim of the plaintiff is statute-barred and whether the principle of adverse possession applies.

The contentions

It is the contention of the learned counsel for the remaining defendants that the claim of the plaintiff is statute-barred under the Sabah Limitation Ordinance ('the Ordinance'). In one sense it was argued that pursuant to art 112 of the Schedule to the Ordinance the plaintiff could no longer claim to have any interest over the portions of the land occupied by the remaining defendants as the same had vested upon the remaining defendants through the doctrine of adverse possession.

The other articles of the Schedule to the Ordinance relied upon by the remaining defendants are arts 108, 110 and 111.

Learned counsel for the remaining defendants further argued that the only way out for the plaintiff to defeat the position of the remaining defendants in so far as the Ordinance is concerned is to prove that in 1982 there was 'permission' given by the previous owners of the land.

And it was also canvassed that the fact that the plaintiff had bought the land from the previous owners could not prevent the inception of adverse possession against it. In addition, learned counsel said that the aggregate separate periods of possession by different persons could still establish adverse possession.

Learned counsel for the plaintiff on the other hand approached the case on the basis that the main defences raised by the remaining defendants are on the doctrine of adverse possession and tenancy coupled with equity. But I will deal with the second defence later.

Now, learned counsel for the plaintiff proceeded to identify and deal with the positions of the respective remaining defendants in the manner as follows:

A

In respect of the third defendant, he submitted that there was an unequivocal admission that in 1982 the previous owners allowed him to remain on the land until the owners decide to sell it. And that according to learned counsel would make the third defendant a licensee and thus his occupation has never been adverse. Further since there was no evidence adduced by him on tenancy coupled with equity the third defendant has nothing else to rely upon. Learned counsel therefore asked for judgment against the third defendant.

B

Next, learned counsel dealt with the 42nd defendant where he contended that there was no evidence adduced as to the length of occupation by the previous occupant of the house from whom this defendant bought or that such vendor was ever in occupation of the house. And since the 42nd defendant has been in occupation of the house for less than 12 years his defences of adverse possession and limitation fail.

C

As regards the rest of the remaining defendants learned counsel said that the evidence of sixteen of them, namely, 1st, 2nd, 5th, 6th, 8th, 9th, 10th, 19th, 20th, 30th, 34th, 35th, 36th, 40th, 44th and 54th ('16 defendants') disqualify them from relying on the doctrine of adverse possession. Briefly, the reason given by learned counsel is that these 16 defendants relied upon a fact in that the previous owners of the land granted to the occupants, including them or their predecessors, permission to enter the land and to remain there for as long as they so wish.

D**E**

Thus, despite the 1982 notice there should be no question of unlawful entry. He also submitted thus:

Following their testimonies in court, these defendants have a right to be on the land because they or their predecessors were promised by Man Woo Loong that they or their predecessors could 'open up' or develop the land and stay there for as long as they wish, they have done just that, so the owners could not evict them by simply sending them a notice to quit. It is perhaps not surprising that they have described themselves as being angry when they received the 1982 notice, and that they treated the 1982 notice with contempt.

F**G**

Hence, learned counsel emphasized that since the entry was lawful there could be no adverse possession as the very essence of that doctrine is 'unlawful' entry. Learned counsel in fact agreed with the learned counsel for the remaining defendants on the latter propositions of the law on the doctrine of adverse possession. He did not dispute that the doctrine of adverse possession and hence art 112 of the Schedule to the ordinance apply in so far as Sabah is concerned despite the Sabah Land Ordinance ('the Land Ordinance').

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In respect of the 18th, 53rd and 57th defendants, learned counsel for the plaintiff submitted that although these three defendants did not specifically say that they or their predecessors were given permission by the previous owners to enter and stay on the land as in the case of the 16 defendants their learned counsel took the stand that such fact should also apply to them. Hence, their defence would have to be dealt with in

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A similar fashion. More so in the case of these three defendants learned counsel for the plaintiff contended that they must establish the necessary *animus possidendi* in order to succeed in their defence.

As regards the other articles of the Schedule to the Ordinance referred to by learned counsel for the remaining defendants it is the submission of learned counsel for the plaintiff that on the facts of this case they are not applicable.

Findings

Now, both learned counsel for the parties have lucidly stated the doctrine of adverse possession and I have no reason to disagree. And it states:

Adverse possession, as its words imply, must be actual possession of another's land with intention to hold it and claim it as his own. It must commence with the wrongful dispossession of the rightful owner at some particular time; it must commence in wrong and maintained against right. It must be actual, open, notorious, hostile, under claim or right, continuous, and exclusive and maintained for the statutory period. Indeed it should be so open and exclusive as to leave no doubt as to the intention of the occupant, so notorious that the owner may be presumed to have knowledge of the adverse claim and so continuous as to furnish a cause of action every day during the required period: per AN Bhandari CJ in *Ramlal v Chetu* AIR 1958 Punj 335.

And art 112 of the Schedule to the Ordinance provides:

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Item	Description of suit	Period of Limitation	Time from which period beings to run
112	For possession of immovable property or any interest therein not hereby otherwise specially provided for	12 years	When the possession of the defendant becomes adverse to the plaintiff

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As was done by learned counsel for the plaintiff I propose to adopt his approach in considering the respective positions of the remaining defendants in relation to these first two issues.

G In respect of the third defendant, having examined the evidence adduced by him and the opposing contentions of learned counsel for the parties, I am inclined to agree that this particular defendant while under examination-in-chief indicated that there is truth that in 1982 the previous owners of the land allowed him to remain therein until they (the previous owners) decide to sell it. There was no qualification made to such a statement as given. With that kind of concession it is reasonable to conclude as suggested by learned counsel for the plaintiff that the occupation of that portion of the land by the third defendant must have been only as a licensee. As such he could not rely on the doctrine of adverse possession to defeat the claim of the plaintiff. Hence, the plea under art 112 of the Schedule to the Ordinance in so far as this third defendant is concerned must therefore be considered as having failed.

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I will consider the issue of tenancy couple with equity as regards this particular defendant later.

As for the 42nd defendant, indeed he admitted that he was in occupation of the house for ten years having bought the same from someone who he could not remember. In fact it was his son who negotiated for the purchase. In any event this defendant also admitted that the land belongs to 'the taukeh' whilst only the house belongs to him. His son, Jabran (DW5) also gave evidence.

But again he could not remember the name of the seller save saying that he called him as Mr Ho. Nothing was said whether this Mr Ho was in occupation of the house when the 42nd defendant bought it. Neither was there any disclosure of the length of time this Mr Ho was living in the house if he was in occupation therein in the first place. And it is the burden of this defendant to prove that there has been an occupation of the house and thus that portion of the land for not less than 12 years in order to benefit the doctrine of adverse possession. On the evidence adduced I agree with learned counsel for the plaintiff that there is nothing to suggest that such burden has been satisfied. Hence, it is my finding that the 42nd defendant fails in his reliance on art 112 of the Schedule to the Ordinance vis-a-vis adverse possession.

I now come to the 16 defendants. As indicated hereinabove the stand taken by learned counsel for the remaining defendants including the 16 defendants is that from 1982 after the notice to quit was issued which the occupants of the land including the remaining defendants did not complied with, the limitation period began to run against the previous owners. And despite the sale of the same to the plaintiff it did not halt the period. To him the averment of 'permission' by PW2 — Kwan Chew Ming was an afterthought.

Learned counsel for the plaintiff adopts the position that it is not so much of the 1982 'permission' as emphasized by learned counsel for the defendants. Rather it is the fact that these 16 defendants stated in their evidence that they or their predecessors as early as before the Second World War were granted permission by the previous owners of the land to enter provided they cleared the areas occupied. This fact, according to learned counsel prevents the setting of the doctrine of adverse possession since the initial entry was lawful.

Having considered the judicial meaning of that doctrine and the undisputed fact, I am inclined to agree with the approach taken by learned counsel for the plaintiff. Indeed the requirement of 'unlawful' or 'wrongful' entry or occupation of an immovable property is the very essence of the doctrine of adverse possession. In this case in view of undisputed fact such element is therefore absence (see *Hughes v Griffin* [1969] 1 All ER 460). Of course whether such undisputed fact gives rise to another right to the remaining defendants including the 16 defendants is another matter which I will deal with later in this judgment.

In fact I also agree with learned counsel for the plaintiff that the letter dated 14 January 1996 (exh A pp 33–37) written by the occupants of the land including the remaining defendants to the previous owners speaks for itself thereby indicating the actual stand taken by the remaining defendants

A including the 16 defendants. That letter of course asked for 'due and proper' compensation as a condition for the occupants of the land including the remaining defendants to vacate it.

B As regards the notice issued in 1982 by the previous owners that in my view was bad in law. Firstly, this court did not have the benefit of the actual content of the notice and thus it could not be ascertained if there was any period given to vacate the land proportionate to the period of stay granted to the occupants, including the 16 defendants or their predecessors by the previous owners. More so in this case where it is in evidence that the 16 defendants or their predecessors and probably the other occupants not involved in this suit did pay a token yearly rental of between RM9.60 and RM30. In the case of *Rethnasamy v Teoh Ngoo Mooi & Anor* [1983] 1 MLJ 344 this is what Edgar Joseph Jr J (as he then was) said at p 347:

D In my opinion, P2 was not a valid notice to quit because it was not expressed to expire at the end of a complete period of the tenancy and was not equal to the length of that period. Or, to put it another way, the notice was not expressed to expire either on the anniversary of a complete period of the tenancy or on the day before the anniversary of such period. We are here concerned with a monthly tenancy since rent was paid by reference to the month. P2 stipulates that the appellant is required to demolish and remove the premises from the land on or before 30 May 1975. The month of May has, of course, 31 days, and as a result the period of notice was insufficient by one day. It should have been expressed to expire either on 31 May 1975 or on 1 June 1975 (*Sidebotham v Holland* [1895] 1 QB 378, *Crate v Miller* [1947] 2 All ER 45). Alternatively, if one goes by the terms of the tenancy agreement dated 8 January 1965 the notice, P2, should have been expressed to expire on 7 January 1975 or 8 January 1975 so that the period mentioned therein was too long. On either view, therefore, the notice, P2, was bad in law.

F Secondly, in view of the term as contended and not disputed, namely, an earlier permission to enter and stay on the land given to the occupants, including the 16 defendants or their predecessors, I do not think the 1982 notice to quit could have validly terminated it. In the case of *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, Salleh Abas FJ (as he then was) at p 323 said this:

G It was contended that the phrase 'deliver up premises' was ambiguous and uncertain as to what the appellant should do. In our view there is no merit in this submission. As the appellant did not own the land, a notice 'to quit and deliver up possession of the premises known as 22, Lorong Empat, Senai, Johore' must mean that the appellant must vacate or give up the land with or without the disputed house being demolished. The term of the notice was clear enough and it should not therefore be held bad in law on account of ambiguity or uncertainty. *However, the matter did not end there, because the notice, clear and unambiguous in its terms, may not operate to terminate appellant's tenancy, if the appellant could prove to the satisfaction of the court that he had a tenancy coupled with an equity, or sometimes referred to, equitable estoppel.* This leads us to deal with the second issue upon which the learned Magistrate rested his decision but was overruled by the learned judge.

I The law on tenancy coupled with an equity or simply an equitable estoppel arose from the speech of Lord Kingsdown in *Ramsden v Dyson*,

(1866) LR 1 HL 129 in which his Lordship referred to the principle as irrevocable licence. This principle was accepted and applied by the Privy Council in *Plimmer v The City of Wellington* (1884) 9 AC 699. Finally it received its judicial refinement in *Inwards v Baker* [1965] 1 All ER 446, 448. In this case Lord Denning MR defined the concept as follows:

‘It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity ... that the equity arising from the expectation of land does not fail.... The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.’

The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation. (Emphasis added.)

Accordingly, as stated earlier, since the initial entry of the land by the 16 defendants or their predecessors was not wrongful or unlawful, it is therefore my judgment that the basic ingredient of the doctrine of adverse possession has not been satisfied and thus it does not apply in this case. As such, the reliance on the doctrine vis-a-vis art 112 of the Schedule to the Ordinance in particular by the 16 defendants in defence of the claim of the plaintiff is obviously misconceived. It follows that the 1982 ‘permission’ as stated by PW2 is quite irrelevant in determining the doctrine of adverse possession in so far as this case is concerned. And this foregoing finding will include the eighth defendant although learned counsel for the remaining defendants argued that his evidence was not challenged. He cited the case of *Aik Ming (M) Sdn Bhd v Chang Ching Chuen* [1995] 2 MLJ 770. But with respect that case should be now read in the light of the subsequent decision of the Federal Court on the same matter though under a different name of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465. There, the Federal Court did not affirm the conclusion of the Court of Appeal that failure to cross-examine Dato Tan on his affidavit would mean that there was an admission. The court said that it was a misdirection to make such a conclusion. And my reading of the case is that it depends on what is ‘germane to the issue at hand.’ In the present case the eighth defendant was the last witness called and his version in fact took the same line as that of the other defendants called as witnesses. And in view of the approach taken by the plaintiff as regards the issue of adverse possession and by reason of its acceptance as a ‘common ground’ the assertion that there existed a promise given by the previous owners of the land to the occupants, including the 16 defendants or their predecessors, I do not think it is fatal to the plaintiff’s case when the eighth defendant was not cross-examined on his evidence.

As regards the 18th, 53rd and 57th defendants the answer to their reliance on adverse possession would be the same as that for the 16 defendants in view of the overall similar factual stand taken by their

A learned counsel. And that would be the position notwithstanding the fact as pointed out by learned counsel for the plaintiff that these three defendants did not testify that they stayed and developed the areas of the Land on which their houses now stand pursuant to a promise by the previous owners or Man Woo Loong.

B In the event that I am wrong in the foregoing finding in respect of these three defendants, then I am inclined to agree with the contention of learned counsel for the plaintiff that of the two requisite elements to establish adverse possession, namely, factual possession for a period of 12 years or more under the Ordinance and *animus possidendi*, the latter has not been proved by these three defendants (see *Buckinghamshire County Council v Moran* [1990] 1 Ch D 623). Indeed the evidence shows that the 18th defendant has been under a belief that from 1982 to 1995 she has the permission of the previous owners to stay on the portion of the land where her house is. Hence, I agree with learned counsel for the plaintiff that in such a situation there could not have been any hostile intention towards the previous owners.

D And again that letter dated 14 January 1996 (exh A pp 33–37) further undermines her position as she agreed therein for compensation in lieu of possessory interest.

E Similarly, for the 53rd defendant her evidence showed that she bought the house from another person in 1984. However, there was no evidence to show the status of that other person in relation to the land. This defendant also signed the 14 January 1996 letter seeking for compensation in lieu of possessory interest.

F And finally for the 57th defendant she stands on similar position as that of the 16 defendants and thus the findings thereof apply.

I now deal with the other articles of the Schedule to the Ordinance as cited by learned counsel for the remaining defendants including the 16 defendants.

G Firstly, those articles of the Schedule to the Ordinance read:

	Item	Description of suit	Period of Limitation	Time from which period begins to run
	108	By a landlord to recover possession from a tenant	12 years	When the tenancy is determined
H	110	For possession of immovable property, when the plaintiff while in possession of the property; has been dispossessed or discontinued the possession	12 years	The date of the dispossession or discontinuance
I	111	Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition	12 years	When the forfeiture is incurred or the condition is broken

And s 26 of the Ordinance states:

At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immovable property the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished.

Now, in respect of art 108, learned counsel for the remaining defendants contended that it applies in this case. His reason for taking such a stand is based on the assertion that the nature of the relationship between the previous owners and the remaining defendants or their predecessors was one of landlord and tenant before the 1982 notice was issued to terminate it. He cited the case of *Sidram Lachmaya v Mallaya Lingaya Chilaka* AIR 1949 Bom 137. Learned counsel also said that under this article there is no requirement for the remaining defendants to prove adverse possession in order to succeed.

In reply learned counsel for the plaintiff submitted that art 108 has no application as the plaintiff is not suing in its capacity as the landlord of the remaining defendants. Learned counsel argued that the landlord-tenant relationship is a matter of 'privity between the previous owners and the defendants (if any). And he disagreed that *Sidram's* case has any application since in that case the plaintiff took the action on a landlord-tenant relationship.

Having considered the respective contentions of learned counsel and in view of my earlier conclusion on the ineffectiveness of the 1982 notice I am inclined to agree with learned counsel for the plaintiff. Hence, it is my judgment that art 108 of the Schedule to the Ordinance has no application to the facts of this case.

As to the reason for saying that art 110 of the Schedule to the Ordinance is applicable in this case, learned counsel for the remaining defendants submitted that from the pleadings and the facts adduced at the trial it was apparent that there was dispossession of the then landowners. He averred that when the previous owners leased the land to the occupants including the remaining defendants or their predecessors prior to 1982 the formers were in possession. Then came the 1982 notice which was ignored by the occupants including the remaining defendants or their predecessors. At that point in time according to learned counsel there was dispossession. And it was also not in dispute that the previous owners thereafter never visited the land. The plaintiff, learned counsel submitted, should therefore prove that it has been in possession of the land within 12 years of the suit whilst the remaining defendants need not prove adverse possession.

In rebuttal learned counsel for the plaintiff argued that the statement of claim — para 3 states that the plaintiff 'pleads and relies on the fact that the plaintiff, having purchased the land from the previous owner, was registered as the legal owner on 8 December 1995'. And he continued that the 'plaintiff's cause of action is based on its paper title to the land, and not on a possessory title (that is, one based on a plaintiff's prior and better possession to the defendant's who having dispossessed the plaintiff is presently in possession)'. The Indian case of *Kanhaiya Lal v Girwar* AIR 1929 All 753 was cited. In that case the Appellate Court held thus at p 753:

- A** The article applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is art 144, Sch1, Limitation Act and if in such a suit the plaintiff proves his title, he is entitled to a decree unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. To cases in which the plaintiff claims relief on the basis of his title art 142 has no application. That article applies to suits in which the plaintiff claims possession of property on the ground that while in possession he was dispossessed, or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title Possession is in itself title and good against everybody except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to claim to be restored back to possession on proving the fact of his possession and his dispossession or discontinuance of his possession by the defendant within a period of 12 years prior to the institution of the suit. To such cases art 142 applies, and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years of the date of the suit lies on the plaintiff and on proving these facts, the plaintiff is entitled to a decree unless the defendant established that he is the true owner of the property in dispute.
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- C**
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Now, art 144 of the Indian Limitation Act 1908 is equivalent to art 112 of the Ordinance whilst art 142 thereof is in *pari materia* with art 110 of the Ordinance. And having examined the pleadings of the plaintiff, indeed

E I agree with learned counsel for the plaintiff that the claim of his client is based on its title to the land and not on possessory title. Hence, art 110 has no application.

Finally on art 111 learned counsel for the remaining defendants submitted that it is applicable in this case since there is no dispute that a tenancy in relation to the land existed prior to 1981 between the previous owners and the occupants of the land including the remaining defendants or their predecessors. And after the 1982 notice the occupants including the remaining defendants neither paid rentals nor vacated the land. This conduct according to learned counsel was in breach of the tenancy and actionable within the period of 12 years. Since there was no action within that period the present suit according to learned counsel would therefore be clearly barred by art 111.

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In response, learned counsel for the plaintiff submitted that art 111 has no application as the plaintiff is claiming for possession based on its title to the land and not for forfeiture or breach of a condition expressly stipulated in a tenancy agreement, if any, with the remaining defendants.

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Now, on the evidence adduced there is nothing to show that there existed a tenancy with express terms. No doubt the evidence indicated that the occupants including the remaining defendants paid rentals. But save for the payment nothing else to show that there were other terms upon breach would result in forfeiture or other penalties. To say therefore that the non-payment from 1982 provided to the previous owners a cause of action for breach of a term of tenancy is quite unfounded. Further, there was no evidence adduced as to the exact nature of the 1982 notice. At any rate, I agree with learned counsel for the plaintiff that any tenancy would have

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been between the previous owners and the remaining defendants. Moreover, the cause of action in this suit is based on title and not on possessory title. As such it is my judgment that art 111 of the Schedule to the Ordinance has no application in this action.

That leaves art 112. Learned counsel for the plaintiff contended that it is the only article that is relevant in this case. I am inclined to agree. And in view of what has been discussed earlier in this judgment it is also of no help to the remaining defendants.

Before I move on to the other agreed issues there is one other matter that I should address in relation to these two agreed issues and that is on the applicability of sub-s 6(2) of the Land ordinance. It was raised by learned counsel for the plaintiff as an alternative to his submission on the inapplicability of the doctrine of adverse possession to the facts in this case. That subsection reads:

- (2) Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the owner or any person entitled to an interest therein, and accordingly, any written law relating to the limitation of suits in force in Sabah shall in no circumstances operate to extinguish any title to, or interest in, land.

Learned counsel for the plaintiff argued that the subsection applies and thus it provides the answer to the assertion of the remaining defendants on the issue of adverse possession. Whilst he agreed that there is a presumption against the subsection having retrospective effect since it is not mere procedural but affects vested rights, learned counsel therefore said that his argument would be quite limited. He contended that although it is only an amendment effective from 24 December 1997 it is retrospective in effect as it is declaratory in nature. The reasons given for such a contention are: (i) the language used in the subsection; and (ii) it was enacted to resolve doubts in the Land ordinance vis-a-vis adverse possession and the ordinance. As to (i) the phrases 'for any length of time whatsoever' and 'in no circumstances operate' in the subsection were emphasized. And in respect of (ii) learned counsel pointed out that if the doctrine of adverse possession were to apply there would be several practical problems such as extinguishments of title, the requirement of s 88 of the Land Ordinance and whether the definition of state land as prescribed therein includes alienated land.

Meanwhile, learned counsel for the remaining defendants submitted that in the nature of the amendment and in view of the vested right acquired by the remaining defendants, that is, their right to plead the relevant articles, in particular art 112 of the Schedule to the ordinance, that subsection could not be applied retrospectively.

Now, it is an entrenched rule of statutory interpretation 'that no statute shall be construed to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication' (see Maxwell on *The Interpretation of Statutes* (12th Ed) by P St J Langan at p 215). And Buckley LJ restated the rule in the case of *West v Gwynne* [1911] 2 Ch 1 at p 12 as thus:

A As matter of principle, an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. *But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.* (Emphasis added.)

B Nevertheless, it should also be borne in mind that the rule against retrospective operation is a presumption only and 'it may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it'. Accordingly, in the case of in *Re Lovell and Collard's Contract* (1907) 1 Ch 249 it was thus propounded that not only the language that should be examined but to determine as well whether there were doubts that needed to be addressed by the statute. Indeed Scarman J in the case of *Carson v Carson* [1964] 1 WLR 511 had this to say at p 517:

... the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject-matter with which the statute is dealing.

D Hence, as submitted by learned counsel for the plaintiff, one way to overcome the principle of non-retrospective effect of a statute is to interpret or construe it as being declaratory in nature. And that can be achieved by reading the words therein.

E And on the nature of declaratory statutes *Francis Bennion's on Statutory Interpretation* (2nd Ed) has this to write at p 105:

A declaratory Act or enactment declares what the law is on a particular point, often 'for the avoidance of doubt'. The subject-matter may be a rule either of common law or statute. The declaration need not be express, but may arise by implication.

F An Act purporting to be declaratory may in fact change the law ...

Since nevertheless a declaratory provision does not purport to change the law, it is presumed to have retrospective effect. All this means is that the law as so declared is taken always to have been operative (in the case of a common law rule) or to have been operative since the commencement of the enactment in respect of which the declaration is made (in the case of statutory provisions).

G It is also an accepted rule of statutory construction that where a section consists of subsections the meaning to be given to those subsections must be considered by looking at the section as a whole. In the case of *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors* 1962 AIR SC 1543, the Supreme Court of India held 'that the words used in a section must be given their plain grammatical meaning'. Where the court is dealing with two subsections of a section, it is necessary that the two subsections must be construed as a whole 'each portion throwing light, if need be, on the rest.' The two subsections must be read as parts of an integral whole and as being inter-dependent.' It is not legitimate for the court to rewrite the subsections.

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Now, sub-s (1) of s 6 of the Land Ordinance states thus:

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- (1) Notwithstanding anything to the contrary contained in this ordinance or in any written law relating to limitation of suits in force in Sabah, no unlawful occupation of State land or land reserved for a public purpose or residential purpose or occupation under temporary licence for however long a period shall establish any right, title or interest in State land or land reserved for a public purpose or residential purpose or create any right to demand a title to such land from the Government.

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It is obvious that upon the legislation of the Land Ordinance the Legislature in its wisdom did not initially include alienated areas of State land. I am aware of the view expressed in the case of *Narinder Kaur v Deyoh Opong* [1997] 2 CLJ 895 that the word 'state land' in s 6(1) should include alienated lands. With due respect I am unable to agree. I think the definition of state land as given in the Land Ordinance is very clear and there is therefore no reason to widen its meaning. The definition of 'state land' under s 4 of the Land Ordinance reads:

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'State land' means all lands which have not been and may not hereafter be reserved for any public purpose, or which have not been and may not hereafter be leased or granted to or are not and may not hereafter be lawfully occupied by any person, and includes all lands which, at the commencement of this Ordinance, may have become or which hereafter may become forfeited by reason of any breach of the conditions on which the same have been lawfully occupied, or which have been or may hereafter be surrendered to the Government by the lawful owner thereof;

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And in the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 the Federal Court seems to suggest that the doctrine of adverse possession is applicable in appropriate cases under the Land Ordinance when Edgar Joseph Jr FCJ at p 24 opined that '..., in Sabah, unlike Peninsular Malaysia and Sarawak, in appropriate circumstances the doctrine of adverse possession may be invoked against private owners of land (see s 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in state land only based on adverse possession thereof)' I also noted that the learned counsel for the plaintiff declined to support the view expressed in *Narinder's* case. Accordingly, it is quite illogical to now say that sub-s (2) of s 6 of the Land Ordinance only declares what should have been the law unlike in some of the cases cited herein above where even the phrases such as 'hereby declares' or 'for the avoidance of doubt' in the amending or new statutes were used thereby allowing the courts thereof to conclude that such statutes were declaratory in nature. I am therefore of the view that the language of the subsection itself does not permit it to be construed as declaratory in nature. Indeed the fact that the amending provision only took effect from 24 December 1997 should pre-empt any suggestion that the legislature intended it to have a retrospective effect.

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As to the submission of learned counsel for the plaintiff that there are several doubts in the Land Ordinance which entails the subsection to be read as declaratory in nature and thus retrospective in effect, I find it difficult to agree. If indeed it was the intention of the legislature to do just

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A that then the appropriate words or phrases to that effect would have been used. It must be understood that the primary function of the courts is to interpret the law and not to legislate or add items which the legislature in its wisdom did not include in the first place (see *NKM Holdings Sdn Bhd v Pan Malavsia Wood Bhd* [1987] 1 MLJ 39).

B Hence, I do not think sub-s 6(2) of the Land Ordinance can be construed as having retrospective effect. This alternative submission of learned counsel for the plaintiff therefore fails.

Issues 4 and 5

C Contentions

These two issues are connected and they deal with the point of tenancy coupled with equity and compensation.

D Learned counsel for the remaining defendants submitted that in view of the promise made by the previous owners to the remaining defendants or their forefathers that they could come to stay on the land as long as they wished provided that they developed it and paid rentals until 1982, his clients should have therefore acquired tenancy coupled with equity. He maintained that the defendants could not be evicted and that the transfer of ownership did not affect such equity. He further submitted that such equity must be satisfied by way of compensation if the plaintiff were to repossess the land. Some of the cases he cited were, namely, *Mok Deng Chee v Yap See Hoi & Ors*; *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. Section 28(2) of the Civil Law Act 1956 was also referred to.

F Learned counsel for the plaintiff on the other hand argued that out of the remaining defendants only 16 defendants gave evidence that might support a claim of tenancy coupled with equity. According to learned counsel the evidence of the rest are incapable of supporting such a claim. And the basis for him in saying such is that the law requires the following:

- G**
- (a) that the claimant must have been led to believe or expect that he would have some kind of interest in the land he is occupying;
 - (b) in reliance on this belief or expectation the claimant had expended money in improving the land either with the encouragement or acquiescence of the landowner; and
 - (c) it would be unconscionable or unjust to evict the claimant without first satisfying the equity.
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Learned counsel said that items (a) and (b) have not been established by the five defendants, namely 3rd, 18th, 42nd, 53rd and 57th.

I In respect of the 16 defendants learned counsel for the plaintiff relied on the nature of the pleadings filed. He cited para 10 of the defence and said that adverse possession and tenancy coupled with equity as defences are separate and mutually exclusive. Yet, according to learned counsel, after the evidence were given the 16 defendants went on to utilize both grounds whilst at the same time relying on the same evidence. He contended that

such an approach would destroy one while in the process of building the other.

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Learned counsel also expressed doubt on the quality of the evidence adduced to support the averment that there was a promise of the previous owners to the 16 defendants or their forefathers.

Findings

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On the issue of 'separate and mutually exclusive grounds' as submitted and the 'fatal' consequence in the event of pursuing both in an action, regrettably such preposition has not been substantiated with authorities to assist the court. Learned counsel cited the case of *PR Panikar v Chwee May Kwong* [1958] MLJ 136 which was followed by the case of *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646 are not helpful as those cases deal with a situation where the opposing party abandoned his pleaded defence and accepted the facts as adduced by the other party. In such a case there is nothing much left for that party to relied upon unless amendment to his pleading is made. In the instant case however I do not find such situation has arisen. In fact I find that there is no dispute on the assertion of the remaining defendants, in particular the 16 defendants, that the previous owners of the land granted them or their forefathers permission to stay on the land for as long as they wish but that they have to develop the areas occupied. Indeed this assertion was taken as a fact by learned counsel for the plaintiff in his rebuttal on the claim for adverse possession by the 16 defendants. As such I do not think the foregoing preposition of learned counsel for the plaintiff has any merit.

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That leaves the issue of whether equity has been established on the evidence adduced. In view of the acceptance of the assertion as aforesaid and taking guide from the principles of law as stated in cases such as *Mok Deng Chee v Yap See Hoi & Ors*; *Ramsden v Dyson* (1866) LR 1 HL 129; *Inwards v Baker* [1965] 1 All ER 446; *Bannister v Bannister* [1948] 2 All ER 133 and *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 to mention a few I do not think it can be denied that the 16 defendants should be taken to have established equity thereby allowing them to be on the land. That equity may be satisfied by way of payment of compensation. And that appears to be in the minds of the signatories to the letter dated 14 January 1996 (exh A pp 33-37) including the remaining defendants. Therefore the next question is on the quantum payable. But before I deal with that I think it is only fair that I should consider whether the five of the remaining defendants, namely, 3rd, 18th, 42nd, 53rd and 57th defendants, have in fact established equity in view of their testimonies in court.

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Learned counsel for the plaintiff submitted that the third defendant (DW2) did not lead evidence to show that he has a tenancy coupled with equity.

I have perused the evidence of the third defendant, a person of 73 years old and I find that there was no challenge to his assertion that he has been staying on the land since birth. There was also no dispute raised that he inherited the house from his father. Meanwhile this defendant admitted that

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A he did sign the letter of 14 January 1996 which letter made reference for compensation in exchange for vacating the land. Accordingly I do not think this third defendant should be denied of the equity as found for the 16th defendants.

B Next, the 18th defendant is also said to have failed to establish equity in respect of her stay on the land. But I think the stand taken here by learned counsel for the plaintiff contradicts the position adopted when rebutting the claim for adverse possession by this defendant. Therein it was submitted as the common ground of the remaining defendants that there was a promise that they could stay on the land for as long as they wish. And that was acceptable to the learned counsel for the plaintiff. In view of that I do not think it is now appropriate for the plaintiff to shift its position when it comes to the issue of equity. No doubt the onus is on this defendant to show that she has acquired equity in respect of her stay on the land. However owing to the position taken by the plaintiff earlier I do not think this defendant should be subject to strict proof on that onus. It is therefore my finding that the 18th defendant has also secured equity in connection with her stay on the land. Even if I am wrong in the foregoing I would venture to say that the fact that the previous owners allowed this defendant to occupy and build her house on the land without any hindrance for a period of time should entail an acquisition of equity by her.

E Similarly for the 42nd defendant it was also submitted that he failed to show that he had acquired tenancy coupled with equity.

F On perusal of the evidence of this defendant and that of his son (DW5 — Jabran bin Kilong) it is quite obvious that their testimonies centred on the fact that the house in which they occupied was bought from one Mr Ho about 10 years ago. There was no question of any promise given by the previous owners. However, it is not in dispute that there was no form of protest or concerted action taken made by the previous owners as regards the occupation by this defendant of the house and hence a portion of the Land other than merely sending notices. Surely this could be construed as a form of encouragement on the part of the previous owners.

G For the 53rd defendant it was also submitted by learned counsel for the plaintiff that there was no evidence of tenancy coupled with equity. I would say that the position of this defendant is the same as that of the 18th defendant where in rebutting the claim for adverse possession learned counsel for the plaintiff relied on as a fact that there was a promise similar to that was given to the 16 defendants. Thus, I would equate the position of this defendant to be in the same category as that of the 18th defendant in connection with the question of tenancy coupled with equity.

H Finally, I come to the 57th defendant. For the same reasons, I would place this defendant in the same category as that of the 18th and the 53rd defendants.

I In short, it is my finding that the remaining defendants have established their tenancy coupled with equity on the balance of probabilities as regards their occupancy of the land. And as it has been shown, in particular through their letter to the previous owners dated 14 January 1996 (exh A p 33) that they would be amenable for compensation payment in satisfaction of their

equity I would therefore say that the fair conclusion to make is to consider the appropriate value of that equity.

Learned counsel for the remaining defendants submitted that the sum of RM60,000 should be a fair figure for each of the remaining defendants in order for the plaintiff to buy their equity. On the other hand learned counsel for the plaintiff argued that the remaining defendants did not adduce any evidence as to the true value of their houses and fruit trees. And he referred to the other cases where compromises were reached. Learned counsel pointed out that in those cases the sums given were between RM5,000 and RM4,500 plus a period of one year to vacate.

Firstly, I am inclined to agree that the remaining defendants adduced no evidence as to the value of their houses save that some of them did say that they did renovations and some improvements. However, such piece of information does not help much as to the true value of those houses. Meanwhile there was no dispute on the assertion of the plaintiff as to the amount paid to those occupants who agreed to compromise. Hence, I think it is only fair that I should take such payments as a guide in considering the amount payable. I am minded at first to send this matter for assessment before the deputy registrar. However on further consideration I think that process would not help much and might trigger the feeling of unfairness either to those who had already compromised or to the remaining defendants should the assessments turn out to be not in their favour. I would therefore say that the sum of RM5,000 be given by the plaintiff to each of the remaining defendants in satisfaction of their equity and that they be allowed a period of six months from the date of this judgment to vacate the land. I am aware that the other occupants were given one year by the plaintiff to vacate. But that was either before the hearing of this suit or while it was going on. Since the conclusion of the trial the remaining defendants have been enjoying the benefits of staying on the land until the delivery of this judgment. I think that period if added to the six months should be more than sufficient for them to vacate.

And that leaves the 41st defendant who did not come to court to contest the suit. No doubt he may have left the matter to his counsel. But it is a fact that no evidence was led on his behalf. Thus even if his defence is as per the pleading the truth of his assertion therein would still be required to be tested under oath before any consideration or weight could be placed upon it. Hence, I do not think the 41st defendant should be put under the same category as the other remaining defendants. I am therefore inclined to agree with learned counsel for the plaintiff that in his case judgment for the plaintiff as prayed for should be entered.

There are other subsidiary issues raised but I do not think they are of any significance as to be able to persuade me to come to a different conclusion.

Conclusions

To summarize, my conclusions from the above findings are as follows:

- (1) that the claim for adverse possession and thus the defence of limitation as raised by the remaining defendants fail;

- A** (2) that s 6(2) of the Sabah Land Ordinance does not operate retrospectively;
- (3) that the remaining defendants have established equity as raised on the balance of probabilities and hence compensation is payable to satisfy such equity; and
- B** (4) that since the 41st defendant did not adduce any evidence in support of his pleading his defence fails.

Accordingly, the order that I should make with some variations, is as prayed for by the plaintiff, namely, that the remaining defendants having established equity are entitled for compensation from the plaintiff. And to satisfy such equity the plaintiff is to pay each of the remaining defendants the sum of RM5,000 within 30 days from the date of this judgment and thereafter the remaining defendants are to vacate the land within six months from the date of this Judgment.

- C**
- D** As for the 41st defendant judgment is hereby entered for the plaintiff in that the 41st defendant is to vacate the land within two months from the date of this Judgment without any compensation payable.

On the question of costs learned counsel for the remaining defendants urged this court that no order as to costs should be made since his clients are poor people. Learned counsel for the plaintiff asked for costs.

- E** Now, as the question of costs is a discretionary matter for this court to consider and to exercise its power as it deems fit, I am of the view that bearing in mind the final order that I have made I should make no order as to costs. It cannot be said that the plaintiff has succeeded outright nor can the remaining defendants, save for the 41st defendant, be taken to have lost entirely. Thus, as against the 41st defendant, I order costs against him to be taxed and paid to the plaintiff.

- F** *Order accordingly.*

Reported by Jafisah Jaafar

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